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# In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1153

SAMUEL C. CASHIO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. 31-36) is not yet officially reported. The views of the district court in ruling on petitioner's motion for a new trial or to arrest judgment or for judgment of acquittal notwithstanding the verdict (R. 932-935, 940, 948-955)[1] are not reported.

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[1] "R." references are to the two volume transcript of trial proceedings filed in the court of appeals as the appendix, and certified to this Court by the Clerk of the court of appeals.

## JURISDICTION

The judgment of the court of appeals was entered on December 9, 1969, and its order denying a petition for rehearing was entered on January 6, 1970. (Pet. 37-39.) The petition for certiorari was filed on February 4, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the district court erroneously denied petitioner's motion for a new trial which he supported by an affidavit alleging that a juror on voir dire concealed a bias against petitioner.

2. Whether the district court should have granted a motion for an acquittal made by petitioner at the conclusion of the government's case in chief.

3. Whether the district court erroneously refused petitioner's request to charge the jury that they could find from his character evidence alone that a reasonable doubt existed as to his guilt of the offenses charged.

## STATEMENT

Petitioner, an attorney and former state legislator and local district attorney, was found guilty, after a jury trial, on four counts of an indictment wherein he was charged with willfully subscribing false income tax returns for 1956, 1957, 1958, and 1959, in violation of Section 7206(1) of the Internal Revenue Code of 1954. Petitioner appealed from a sentence placing him on unsupervised probation for two years

and imposing fines totaling $20,000. (R. 1-4, 69-70.) The government's evidence tended to show that, during these four years, petitioner failed to report additional income in the total amount of $40,624.90, which, as stated in the bill of particulars (R. 14-17), was attributable to income from a law partnership, to insurance commissions, and to legal fees not included in the partnership income.

## ARGUMENT

1. There is no merit to petitioner's contention (Pet. 7-14) that the district court abused its discretion in denying the new trial requested by petitioner on the ground that a juror had concealed bias and hostility during his voir dire examination. The court, in conducting the voir dire, had addressed questions to the jury in general, asking them if they were "acquainted with" petitioner or had "other than voting * * * been active in any campaign for the defendant or against the defendant, in any of his political activities" (R. 117, 125), or were unable for any reason to "return a just, fair, honest, impartial verdict based solely and entirely on the law and the evidence" (R. 126). On November 12, 1968, petitioner filed a second amended motion (R. 55-57) praying that the court reverse the verdict of September 27, 1968 (R. 4) on the ground that juror Leroy Alfred "at one time had some animosity or hostility toward defendant, which was not known to defendant" (R. 55). In support of this motion, petitioner attached the affidavit of one Pizzolato (R. 58-59), alleging that in

connection with a Democratic primary election in 1964, he had solicited Alfred on behalf, *inter alia*, of the candidate for sheriff,[2] and that Alfred "exhibited a definite animosity toward Mr. Cashio and Mr. Griffon" (the candidate for sheriff), and further that Alfred stated "he had not gotten justice from Mr. Cashio and Mr. Griffon" when he made a complaint to them of having been beaten by "white youths". Petitioner's motion alleged that he had forgotten that Alfred had made this complaint to him and further alleged that there was no arrest or prosecution because Alfred's alleged assailants could not be identified. (R. 56.)

Leroy P. Alfred stated, in an affidavit filed by the government in opposition to petitioner's motion (R. 61-66), that upon reading Pizzolato's affidavit in the newspapers he had promptly advised the Assistant United States Attorney that the claim was false, and (R. 62) that he had never had "or exhibited any animosity or hostility toward Samuel C. Cashio". Alfred's affidavit stated that, although the grand jury failed to return an indictment after hearing Alfred's testimony about the beating, he "was completely satisfied with the action taken by Mr. Cashio,

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[2] No allegation was made in petitioner's motion or in his present petition that he was engaged in any political campaign in 1964, and he testified (R. 619, 704) that during his service as district attorney he had "no opposition in any elections or any candidacy for district attorneyship." There appears no basis for petitioner's present charge (Pet. 10) that Alfred "did not advise the Court of his participation in a political campaign in which petitioner was a candidate for District Attorney".

and felt that the failure of a charge to be brought against those who assaulted him was, as understood by the affiant, because of the lack of evidence in relation to the subject case, and not because of any failure on the part of Mr. Cashio to perform his duties as District Attorney". (R. 62.) The affiant further related that in 1962 he had a 15 minute talk with petitioner in the latter's office of district attorney about the title to some public property being offered for sale. Affiant Alfred stated that he had never actively campaigned for or against petitioner and understood the voir dire questions to mean "socially" acquainted with petitioner and felt there was no reason why he could not have sat as a fair and impartial juror in petitioner's trial. (R. 62-63, 65.)

At the hearing of the new trial motion (R. 925-955), petitioner offered no evidence and did not call the affiant Pizzolato as a witness. The district court denied his request to interrogate Alfred on the ground that the juror had not "improperly withheld any information" (R. 951) and that petitioner was "convicted on two very damning affidavits which he himself signed, one saying that the money was fees and the other saying that they were not" (R. 953).

The court of appeals correctly noted (Pet. 35-36) that petitioner had not established that it was an abuse of discretion for the district court to deny his motion on the basis of the affidavits, and to refuse his request to interrogate the juror. Such motions may be decided on affidavits, and it is the exceptional case where oral hearings are allowed. *United States*

v. *Hoffa*, 382 F. 2d 856, 866 (C.A. 6), certiorari denied, 390 U.S. 924; *Lyles* v. *United States*, 272 F. 2d 910, 912 (C.A. 5); *United States* v. *Crowder*, 351 F. 2d 101, 104 (C.A. 6). Petitioner had the burden of proof to establish a prejudicial bias in the juror and his failure to produce any witness or evidence at the oral hearing deprived Pizzolato's affidavit of probative weight. *United States* v. *Hoffa*, 268 F. Supp. 732, 734 (E.D. Tenn.), affirmed, 382 F. 2d 856 (C.A. 6), certiorari denied, 390 U.S. 924; *Brown* v. *United States*, 356 F. 2d 230, 232-233 (C.A. 10); *United States* v. *Provenzano*, 240 F. Supp. 393, 408 (D.N.J.), affirmed, 353 F. 2d 1011 (C.A. 3), certiorari denied, 384 U.S. 905. The concern expressed by the district court (R. 953), and by the court of appeals (Pet. 36), at the consequences of unwarranted interrogation of jurors is fully warranted.

2. There is no merit to petitioner's contention (Pet. 14-22) that the district court was required to grant the motion to acquit made by petitioner at the conclusion of the government's case.

Petitioner's only present ground for this contention is that the government, in its case in chief, failed to introduce evidence that petitioner actually signed the tax returns in question. Petitioner, however, advanced no such contention in making or arguing the motion to acquit (R. 616-618), thus depriving the government of its right to appeal to the trial court's discretionary authority to reopen the case and permit proof of this rather formal matter. *Hale* v. *United States*, 410 F. 2d 147, 152 (C.A. 5), certiorari denied, 396 U.S. 902; *United States* v. *Webb*, 398

F. 2d 553, 558 (C.A. 4); *Rhyne* v. *United States*, 407 F. 2d 657, 661 (C.A. 7); *Morgan* v. *United States*, 380 F. 2d 686, 703 (C.A. 9), certiorari denied, 390 U.S. 962. As a matter of fact, in the government's case in chief, the revenue agent identified Govt. Ex. No. 93 as an affidavit signed during the investigation by petitioner (R. 39, 456-457, 746), so that there was, as noted by the court of appeals (Pet. 33-34), in addition to the statutory presumption that the defendant's name on the return was actually his signature,[3] an actual evidentiary basis for a comparison of signatures by the jury.

Petitioner, on redirect examination by his own attorney, unreservedly admitted his signature on the tax returns (R. 831-832), and the district court observed (R. 932-933, 954) that petitioner had never raised this issue during the trial and that the signature "has never been" or "ever could be" an issue. The court of appeals correctly adhered (Pet. 32-33) to the view that the sufficiency of the evidence to support a conviction is to be determined from all the evidence when a defendant, after the court denies his motion to acquit at the conclusion of the government's case, introduces evidence in his own behalf. *United States* v. *Calderon*, 348 U.S. 160, 164.

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[3] Section 6064 of the Internal Revenue Code of 1954 (26 U.S.C.) provides:

> SEC. 6064. SIGNATURE PRESUMED AUTHENTIC.
>
> The fact that an individual's name is signed to a return, statement, or other document shall be prima facie evidence for all purposes that the return, statement, or other document was actually signed by him.

3. There is no merit to petitioner's contention (Pet. 22-27) that the district court erroneously denied his request (R. 33) that the jury be given a charge on evidence of good character which, in pertinent part, read as follows:

> * * * you may find from such testimony alone that a reasonable doubt exists as to defendant's guilt of the offenses charged.

The district judge's view (R. 920) was that he adhered to *Edgington* v. *United States*, 164 U.S. 361, more faithfully than did petitioner's phraseology in giving the following instruction to the jury (R. 911):

> Gentlemen, the question of good character has been raised and I charge you that "good character," when considered in connection with all of the other evidence in the case may, of itself, generate a reasonable doubt. Proof of uniform good character may raise a doubt of guilty knowledge and if it does, the defendant is entitled to the benefit of that doubt. Proof of good character may in some cases be the only means by which a defendant can raise a doubt as to his guilt. While proof of good character is not necessarily proof of innocence, it may, nevertheless, be sufficient to raise a doubt as to guilt. The jury might give much weight to evidence of good character, bearing in mind that evidence of good character, when considered with all of the other evidence, may be sufficient in itself to create a reasonable doubt of guilt. In arriving at your verdict, you must consider all of the evidence in the case.

The court of appeals noted (Pet. 34-35) that the court's charge, as given, was in accord with the rule approved in all circuits save in the Seventh and District of Columbia circuits. The case for the "standing alone" instruction depends primarily on a dictum, citing *Edgington*, in *Michelson* v. *United States*, 335 U.S. 469, 476, where this Court, in passing on permissible cross-examination of character witnesses, stated that "this Court has held that such testimony alone, *in some circumstances*, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury *in a proper case* should be so instructed" (emphasis added). The circuit courts are virtually unanimous in rejecting the "standing alone" type of instruction except where they are persuaded that the circumstances of the particular case require that it be given,[4] and there is no need for this Court to reexamine this rule which has proved so workable in practice.

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[4] *Oertle* v. *United States*, 370 F. 2d 719, 726-727 (C.A. 10), certiorari denied, 387 U.S. 943 (adopting majority rule). Other cases are marshalled in Manual on Jury Instructions in Federal Criminal Cases (Seventh Circuit Judicial Conference Committee on Jury Instructions), 33 F.R.D. 523, 583-585.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ERWIN N. GRISWOLD,
*Solicitor General.*

JOHNNIE M. WALTERS,
*Assistant Attorney General.*

JOSEPH M. HOWARD,
JOHN P. BURKE,
*Attorneys.*

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